NO. 83-1164

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD JACK PHILLIPS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the warrantless searches of three apartments violate the Fourth Amendment prohibition against unreasonable searches and seizures?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are the Petitioner, Richard Jack Phillips, and the Respondent, United States of America.

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RICHARD JACK PHILLIPS, Petitioner,

vs.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, Richard Jack Phillips, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on December 6, 1978. A petition for rehearing was denied by the Court of Appeals on November 16, 1983.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached hereto as Appendix "A". The order denying the petition for rehearing and suggestion for hearing en banc is attached hereto as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 6, 1978. The order denying a petition for rehearing and suggestion for hearing en banc was denied on November 16, 1983. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1) and (2).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons and things to be seized.

STATEMENT OF THE CASE

To effect the arrest of the individuals named in the sealed indictment of March 16, 1977, government agents proceeded with an arrest warrant to 8219 Redlands Street, Apartment #1, Los Angeles, California, on March 18, 1977. (Tr. 7) The agents knocked on the door and stated their purpose and authority. The door was opened on the first floor of the two story apartment and, immediately upon entering, two of Petitioner Phillips' co-defendants, Terry Speech and Crystal Overton, were placed under arrest. Neither were placed in handcuffs. The agents did not have a search warrant for

the apartment.

Agent Sauer then proceeded upstairs to the second floor to determine whether anyone else was in the house. After finding no one in the bedroom or closet area, or under the bed, Sauer saw and seized a plain covered blue book with nothing written on the outside of it. (Tr. 20-21) This book, which the trial court ruled prior to trial as being "in a place where he [Sauer] expected it to be" (Tr. 69, 82-85) was found on the night-stand in the master bedroom. (Tr. 8-9, 27, 135) By opening the book without the consent of any of the co-defendants, Sauer determined that it was "seemingly a telephone directory." (Memorandum Opinion,p.6) There was nothing unusual or distinguishing about the book, the list of names, or the telephone numbers and addresses contained therein, yet Sauer took the book with him when he left the Redlands address. No

other evidence was seized in that house.

The agents then proceeded with an arrest warrant to 2268 W. 20th Street, Los Angeles, California. The agents did not have a search warrant for this address either. They knocked, announced their intention and purpose, but received no response. (Tr. 136) Agents at the rear of the house, however, heard a "noise" from the second floor of the apartment and forced entry through the back door. (Tr. 13) This "noise", later determined to be a radio, did not indicate to the agents that any exigency existed or that any evidence was being destroyed.

Once inside, the agents looked through the apartment to insure that no one was there. In an upstairs bedroom, amongst many pieces of furniture, Agent Sauer saw a television stand in the far right corner of the room. (Tr. 16) On this stand was a

plain green book which, according to Sauer, had no writing at all on the outside. (Tr. 28) Sauer picked up the book and looked through it, thereby determining that it was an address book. Believing the book "might have some evidential value," (Memorandum Opinion, p.8) Sauer took it with him when he left the house. No permission was obtained from the defendants to either look at or seize the book. No one was ever discovered in the house and no other evidence was seized.

Later that same day, Agent Dey and two other DEA agents went to 2483 Lake in the Woods Apartments, Ypsilanti, Michigan, to execute arrest warrants they possessed for Petitioner Phillips and another co-defendant. The agents did not have a search warrant for the apartment, although a search warrant had been previously executed at that address. (Tr. 41-42, 50)

The agents knocked, announced their purpose and authority, and were admitted by co-defendant Shaw. She was arrested at the doorway and then brought into the livingroom. Agent Dey then proceeded to the second floor and after waking Phillips who was asleep in the master bedroom, ordered him downstairs and into the livingroom where he was placed under arrest. Neither Shaw nor Phillips were restrained in any way, although agents were present in the room.

After Shaw selected clothes to wear and was dressed, Agent Dey asked her to get her purse and other things she might want to take downtown with her. (Tr. 154) Shaw picked up her purse and was then advised by Agent Dey that the marshal would not allow her to have a container of personal items of that size. Complying with the agent's instructions, Shaw emptied the large purse out on the bed and began selecting items to

place in a smaller bag. During this process, Dey observed two plain bound books without any writing on them. Dey picked up the books, which were not unusual in any way, and without Shaw's permission, opened them up and flipped through them. (Tr. 47-50) Only after doing so did Dey seize the books, deciding that they might have some evidentiary value. (Tr. 42-43)

Agents Dey and Cole then requested that Phillips get dressed. His clothes and a jacked were selected and then searched. In the jacket Cole discovered a small book. He opened the book, without Phillips' permission, and discovered that it contained names and telephone numbers. Cole then seized the books, believing that they might have some evidentiary value.

REASONS FOR GRANTING THE PETITION

I

THE SEIZURE OF CERTAIN EVIDENCE BY LAW ENFORCEMENT OFFICERS AT THREE DIFFERENT RESIDENCES WITHOUT A SEARCH WARRANT OR EXCEPTION THERETO VIOLATED THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

A. The Requirements for Application of the Search Incident to Arrest Exception were not Met in this Case.

At the trial level, the government argued and the court accepted that the seizures involved in this case were justified under the "plain view" and the "search incident to arrest" exceptions to the search warrant requirement. Attention to recent case law shows clearly that neither of these exceptions apply.

The law of the "search incident to arrest" exception to the search warrant requirement has been defined by this Court in Chimel v. California, 395 U.S. 752 (1968).

When an arrest is made:

> [i]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.... There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated

by the Fourth Amendment requires no less. (Id., at 763)

At the Lake in the Woods address, defendant Shaw was arrested in the doorway of her apartment. This arrest, then, defined the area within her immediate control, the area the agents could lawfully search for weapons or evidence which could be destroyed. Later, however, the agents instructed Shaw to go upstairs to the second floor to get dressed and get her purse in preparation for being taken to the stationhouse.

The agent then told Shaw she would have to take a smaller purse. In transferring some items into the smaller purse, the agent noticed two black books and seized both of them.

Phillips was awakened in the master bedroom, then taken down to the living room and arrested. The living room, then, defined his area of control at the time of

arrest. However, when the agents later escorted Phillips back upstairs to get dressed and instructed him to get a jacket, they seized a black book from his jacket pocket.

In both situations, the police impermissibly expanded the area within the defendants' control and then claimed the right to search there pursuant to a search incident to a lawful arrest. As the Court in Chimel stated, unlike the reasons for searching the area within someone's immediate control, there is "no comparable justification...for routinely searching any room other than that in which an arrest occurs..." Id., at 763. Following this reasoning, in a case where officers entered a motel room and arrested the defendant as he was walking into the main room from the bathroom, the Court held the police search of the bathroom illegal as being a search of a room other than that in which the arrest was made. United States

v. Griffith, 537 F. 2d 900 (7th Cir. 1976)

Since Chimel, other courts have recognized that the police may not search an area which the police have made accessible to the arrestee. The Court in United States v. Mason, 523 F. 2d 1122 (D.C. Cir. 1975), in upholding a search incident to arrest in an area the defendant asked to be given access to, indicated:

> Of course, Chimel does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a "search incident to the arrest." Id., at 1126.

Nor may officers create the situation described in Mason, "by ordering the accused to dress and then not bringing him his clothes, thus requiring him to move about the room in order to comply with their directions." Griffith, supra, at 904. It is clear that the police have the right to search areas into which the arrestee may be

expected to move as well as to search articles handed to him at his request. In this situation, a limited search is permissible. State v. Robalewski, 418 A.2d 817 (1980).

Thus, in the instant case, even though the agents had the right to conduct a limited search of both defendants to insure that they did not have any weapons, they did not have justification for seizing the address books. The officers must have reasonable grounds to believe that the objects sought and seized contained contraband or evidence of a crime. United States v. Blake, 484 F. 2d 50 (8th Cir. 1973); Brinegar v. United States, 338 U.S. 160 (1949). As the Court in Warden v. Hayden, 387 U.S. 294 (1967) explained, there must always

> be a nexus -- automatically provided in the case of fruits, instrumentalities or contraband -- between the item to be seized and criminal behavior...probable cause...to believe that the evidence sought will aid in a

particular apprehension or conviction. (Id., at 306-307)

The books in the instant case appeared ordinary in every way. But even after the books in question were opened, no evidence of criminal activity was present; the books contained only addresses and phone numbers. There was, then, only speculation by the arresting officers that the books would reveal something helpful towards the case against the individual defendants. This possibility is an impermissible reason for seizing items incident to a lawful arrest. Although the defendants were placed under arrest, the agents did not handcuff or restrain them in any way, making it unlikely that the agents believed that they were likely to resist, escape, or destroy evidence. See, Griffith, 537 F.2d at 904. As the Court stated clearly in Griffith, the agents could have "posted a guard on the

room, obtained a search warrant and later returned to search the room pursuant to that warrant." Id., at 904.

B. The Requirements for Application of the Plain View Exception Were Not Met in This Case.

The "plain view" exception to the search warrant requirement has been firmly established by this Court in Coolidge v. New Hampshire, 403 U.S. 443 (1970), where the police unlawfully searched defendant's car following his arrest on a murder charge. In holding that the "plain view" exception was inapplicable, the Court explained that in most cases, any evidence seized by police will be in plain view, at least when the seizure occurs. This does not mean, however, that a warrantless seizure of the items is justified under a "plain view" exception. "The problem", this Court explained, is to "identify the circumstances

in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal." Id., at 465. When the legal requirements of "plain view" are applied to the seizures at all three apartments in this case, it is clear that the exception is inapplicable.

The requirements of the "plain view" exception to the warrant requirement are that (1) the officer must have prior justification to be in a position to view the evidence; (2) the discovery of the object must be inadvertent; and (3) its evidentiary value must be immediately apparent to the officer. Id., at 446.

(1). There was no Valid Intrusion at the 20th Street Apartment Prior to the Seizure.

At the apartment at 20th Street, the forced entry by the agents was unlawful and as the officers therefore had no justi-

fication for their presence prior to seizing the closed green book on the nightstand, the warrantless seizure fails the "plain view" test.

When the agents arrived at the 20th Street apartment, they knocked on the front door but received no response. Agents at the rear door heard a "noise" or "noises" later determined to be the sound of a radio. Based solely on this information, the agents forced open the rear door. Force may be used to enter an individual's dwelling only if officers "reasonably believe" the individual is there and enter to arrest the individual pursuant to a valid warrant. Rodriguez v. Jones, 473 F.2d 599, 606 (5th Cir. 1973). In Rodriquez, there were very strong factual reasons for the officers to believe the individuals, suspects in a recent murder, were at the address the officers forced their way into. A reliable informant identified the

premises by pointing to it three times as he was driven slowly past the location and, further, had told the agents that he had personally seen the suspects at that address that very evening. Id., at 606. In the instant case, however, only vague intuition, instead of substantive facts, supported the forced entry. The officers did not even believe the defendants resided at the apartment. As the Panel Opinion noted, the defendants often used the apartment as a "gathering place" or "haunt." When the officers arrived at the address, it was 8:00 a.m. They did not note whether any cars belonging to the defendants were present, nor if there were any other signs that the apartment was occupied.

Forced entry has been justified when sounds heard inside a dwelling were such as to lead an officer to believe that evidence was being destroyed. United States v. Mapp,

476 F. 2d 67 (2nd Cir. 1973). In Mapp, the the Court ruled that sounds of rapid footsteps reasonably led the officers to believe that people within the apartment were destroying evidence. Similarly, when police see movements by persons inside which appear motivated by an intention to destroy evidence or when no one answers but movements by persons are detected inside, forced entry has been upheld. Dunfee v. State, 346 A. 2d 173 (Del. 1975); People v. Cooper, 37 Ill. App.3d 365, 345 N.E. 2d 506 (1976). Nowhere have the agents in the instant case claimed that the "noise" they heard made them believe that evidence was being destroyed.

As this Court has recently stated in holding unconstitutional a forced entry to arrest an individual without an arrest warrant, the individual's right to privacy in his home is stringently protected by the Fourth Amendment. Even when, as in the

instant case, agents do possess an arrest warrant, there is only "limited authority to enter a dwelling in which the suspect lives when there is no reason to believe the suspect is within." Payton v. New York, 445 U.S. 573 (1980) This "limited authority," it seems, would not encompass a situation, like the present case, where based only on an unidentified "noise" agents could forcibly enter an individual's private dwelling. Because this intrusion was not valid, any items seized by the agents while inside should have been inadmissible under Coolidge.

(2). Items Seized from the Redlands Street and Lake in the Woods Apartments were not Discovered Inadvertently.

During the officers' presence at the Redlands Street apartment, the agent, according to the trial court's oral ruling from the bench prior to trial:

> saw the book on a nightstand by the bed; obviously in plain view, in a place where he expected it to be, and it was seized by him. (Tr. 69, 82-85)

Similarly, the books seized from defendants Shaw and Phillips following their arrest at the Lake in the Woods Apartments were discovered only after Shaw complied with the agent's instruction to move her personal belongings into a smaller purse and only after Phillips complied with the instruction to bring a jacket along with him. Their discoveries were anything but inadvertent; they were either anticipated or caused by the agents themselves.

As the Coolidge Court explained, the rationale of the inadvertence requirement is based on the supposition that a plain view seizure cannot transform an initially valid and therefore limited search into a "general" one. Id., at 470. To circumvent the search warrant requirement by claiming that later

discovery of certain items agents expected to find there was unplanned and inadvertent and that therefore exceptions to the requirement apply was not the purpose of the "well-defined instances where a warrantless search is permissible."

(3). Items Seized From All Three Apartments Were Not Immediately Apparent as Having Evidentiary Value.

All of the items seized from the three apartments were plain-covered books without any writing or identification at all on the outside. There is no way that their evidentiary value could be immediately apparent to anyone. Indeed, there was no way the agents could have even known with certainty that the items were telephone or address books. They could easily have been personal diaries, homework, poetry, or any written material. Indeed, the pages of the books could have been filled with blank

paper.

Where, as in the instant case, ledgers or notebooks have been involved, courts have been especially certain to enforce the plain view requirement that items seized must be immediately recognized as evidence.

> Searches which require an examination of books, papers, and personal effects in a suspect's home are "an especially sensitive matter calling for careful exercise of the magistrate's judicial supervision and control." [citations omitted] United States v. Whitten, 706 F. 2d 1000 (9th Cir. 1983)

In Whitten, the defendant was arrested for making and selling methamphetamine. While conducting a lawful search, officers seized an orange notebook which lay closed on a coffee table and a yellow tablet found on top of a refrigerator opened to the second or third page. The seizure of the orange notebook was found unlawful by the Court:

> There was nothing facially incriminating about the closed notebook from which the DEA agents could reasonably have concluded that it might contain evidence of a crime. Id., at 1013.

The yellow notebook, however, was ruled admissible because the pages which were in plain view had statements on them which, given the nature of the investigation, were immediately apparent as incriminating. Similarly, in the instant case, the agents could not have gained any information whatsoever from the closed, plain-covered books and, therefore, could not seize them as they had nothing before them "immediately apparent" as having evidentiary value.

Indeed, it is because the agents themselves could not determine whether the items had any evidential value that in all three instances they opened up the books and looked through them. To claim that the books' evidentiary value was immediately

apparent after opening them and examining their contents is directly forbidden under Coolidge:

> ...the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. (Id., at 466)

Opening the book impermissibly extended the search. Such inspection of items has been held by the circuit court of appeals to violate the plain view requirements.

In Sharpe v. United States, 660 F. 2d 967 (4th Cir. 1981), the "plain view" exception to the warrant requirement was held inapplicable where officers opened bales of marijuana each consisting of a tube of marijuana wrapped first in paper bags, then in a taped plastic bag, and finally in burlap tied with twine and then placed inside a camper with windows covered by curtains. Similarly, the action of an officer opening

a brown bag in order to then discover United States Treasury checks which then led to the arrest of two individuals in the car for possession of the stolen checks was held violative of the plain view requirement that seized items be immediately apparent as evidence. United States v. Robinson, 535 F.2d 881 (5th Cir. 1976). Inspection of the contents of the bag in Robinson was not allowed even though the defendant suspiciously attempted to push and hide the bag under the seat of the car and even though this action caused a brown window-type envelope to slide out of the bag, an envelope the agent testified he recognized as being the same type which contained government checks.

"Without preadventure," said the Robinson Court, "a paper bag is not an item which would immediately appear to be evidence of criminal activity, nor can it

reasonably be said that a brown window-type envelope which might include a government check is particularly indicative of criminal activity." Id., at 886. The opening of a plain brown bag to discover evidence inside was also held to violate the "plain view" exception in United States v. Shye, 473 F. 2d 1061 (6th Cir. 1973). The Court in Shye explained:

> Completely without merit is the argument of the government that the sack of money was lawfully seized because it was in "plain view" of the law enforcement agents. All that was in plain view was a plain brown bag, which did not itself constitute evidence, a fruit, or an instrumentality of the crime. (Id., at 1066)

The books seized in the instant case were equally as unrevealing as the brown paper sacks in Robinson and Shye and the burlap sacks in Sharpe.

Indeed, even limited inspection which does not include opening items has been

held to violate the "plain view" doctrine. In United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978), FBI agents arrested the defendant pursuant to an arrest warrant and without a search warrant seized a file from a stack of about 60 files located in wire racks. Because the file was clearly labeled on the outside, the government contended it was in plain view. In holding the seizure illegal, the Court emphasized the fact that that particular label was not immediately in plain view as the agent "bent over, read through the folders, and fingered them so that their labels could be read." Id., at 958.

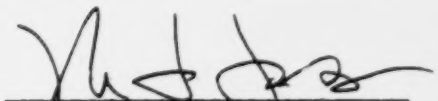
In short, the conduct of the officers in seizing physical evidence from the three residences involved went far beyond being searches incident to lawful arrests or, the seizure of evidence in "plain view". Under the circumstances of this case, it was encumbent upon investigating officers to seek

a search warrant. Absent a search warrant, the seizures were violative of the Fourth Amendment.

CONCLUSION

Based upon the foregoing, Petitioner Phillips urges this Court to grant this petition.

Respectfully submitted,



JOSEPH T. VODNOY
Attorney for Petitioner
RICHARD JACK PHILLIPS

APPENDIX "A"

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2353

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD JACK PHILLIPS aka "R",

Appellant.

No. 77-2354

UNITED STATES OF AMERICA,

Appellee,

v.

TERRY SPEECH, aka "T",

Appellant.

UNITED STATES OF AMERICA,

Appellee,

v.

CRYSTAL OVERTON, aka "C",

Appellant.

No. 77-2356

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERTA SHAW, aka "Ro",

Appellant.

No. 77-2357

UNITED STATES OF AMERICA,

Appellee,

v.

MARZELLUS WILSON, aka "M",

Appellant.

No. 77-2358

UNITED STATES OF AMERICA,

Appellee,

v.

ERNEST L. BODIFORD, aka "E-Man", aka "E",

Appellant.

No. 77-2359

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES C. JONES,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young,District Judge

(Argued: October 6, 1978/Decided Dec.6, 1978)

Before: BRYAN, Senior Circuit Judge, WIDENER and HALL, Circuit Judges.

Rogert E. Zuckerman for Appellant Wilson; Orie Seltzer for Appellant Speech; Leslie L. Gladstone for Appellant Overton; Robert E. Shepherd, Jr. for Appellant Jones (Phillip M. Sutley on brief) for Appellant Phillips, (John G. Turnbull, II on brief) for Appellant Shaw; (Richard Karceski on brief) for Appellant Bodiford; Robert B. Schulman, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney and Peter O. Mueller, Assistant United States Attorney on brief) for Appellee United States of America.

Albert V. Bryan, Senior Circuit Judge:

Convicted in the United States District Court for Maryland, July 28, 1977, of conspiring to manufacture, possess, distribute and dispense heroin and cocaine, and also of related substantive offenses, including illegal interstate travel, all in violation of the Federal statutes, 21 U.S.C. §§841(a)(1), 843(b), 846 and 18 U.S.C. §1252, defendants Richard Jack Phillips, Terry Speech, Crystal Overton, Roberta Shaw, Marzellus Wilson, Ernest L. Bodiford and Charles C. Jones, now appeal. We affirm.

As condensed by their counsel, the "essence of the charged violations" is embodied in the conspiracy count. We review each issue as it is presented and pressed by appellants' briefs. The criminal operations imputed to the appellant-defendants extended from January 1974 through March 16, 1977 and from Maryland

to California, including the District of Columbia and Michigan by the way.[1]

I.

For pre-indictment investigation, Special Agents of the Federal Drug Enforcement Administration (D.E.A.) obtained three authorizations to intercept telephone communications pursuant to 18 U.S.C. §2518. The first was on May 21, 1976, in Ypsilanti, Michigan, for phone numbers 313/485-2562 and 313/415-2451 at Lake in the Woods Apartments; the next was June 21, 1976, in Hillcrest Heights, Maryland, at 3412 Curtis Drive, for phone numbers 301/899-3549 and 301/899-3483; and the last tapped was in Washington, D.C., on June 21, 1976, phone number 202/678-0521, at 2338 24th Street, S.E., which connected with those tapped in Hillcrest Heights. The

1/The indictment was in 26 counts with 21 persons accused.

initial target of the appellants is the validity of these authorizations and the consequent interceptions, particularly those sanctioned for telephone 301/899-3483, at 3412 Curtis Drive, Hillcrest. The contention is that the applications therefor did not meet the prerequisites of the statute, 18 U.S.C. §2518.

To begin with, appellants challenge the application for failing to disclose probable cause for tapping the 301/899-3483 phone in Hillcrest Heights, as demanded by section 2518(1)(b) of 18 U.S.C. They further charge that none of the three applications demonstrated that other investigative procedures had been tried and failed, or why they should not be tried, id. §2518(1)(c). Hence, conclude appellants, the interceptions were invalidly authorized and their use deprived the appellants of their Fourth Amendment guarantees. Our

reading reveals that in every instance the issuing judge was rightly persuaded of probable cause for the taps, as well as that usual and customary probing efforts would not suffice. Agent Story addressed the courts on all three occasions. Each of the applications comply with the exactions of the statute.

II.

Upon return of the sealed indictment in the Maryland Federal Court on March 16, 1977, Government Agents armed with arrest warrants proceeded to the addresses frequented by the indicted parties. Searches conducted by agents endeavoring to execute the warrants are vigorously attacked by occupants of the premises and possessors of the seized items. The entries started at 8219 Redlands Street, Apartment No. 1, Los Angeles, California, in the early morning of March 18, 1977. Appellants Terry

Speech and Crystal Overton opened the door in response to the Agent's knocks and were immediately taken into custody under the arrest warrants. Although told that no one else was in the apartment, one Agent nevertheless searched the place. In this exploration he saw on the night stand in the master bedroom a closed address book, described as having a blue cover without any writing on the outside of it, seemingly a telephone directory. Without express consent of anyone he opened it and found a list of names with telephone numbers opposite. On leaving he took it with him.

Speech and Overton with Phillips unsuccessfully moved to suppress the use of the book as evidence at trial. The motion was not well grounded. The arrests were valid and the Agents looked around the apartment only to ascertain whether Phillips, who lived there, or other indicted persons

were present in order to assure their own safety and make additional arrests. The Agents, therefore, had a right to be where they were. The book was in "plain view" and thus subject to seizure at the time of the arrest. Coolidge v.New Hampshire, 403 U.S. 443, 465-467 (1971).

On the same day, March 18, 1977 about 8 a.m., the Agents moved on to the apartment at 2268 West 20th Street, Los Angeles, again armed with arrest warrants, looking for those under indictment, particularly Phillips and Wagner. These premises were a known gathering place or haunt of the conspirators. The D.E.A. established this information through previous observations over more than a year. This property had also been under surveillance during the execution of search warrants prior to the return of the indictment. Telephone toll records, too, confirmed the use of the 20th Street apartment by the

conspirators.

When the Agents reached this apartment, they sought entrance by rapping on the door, announcing their official capacity and stating their desire to enter. There was no response. Agents placed at the rear of the apartment heard a noise coming from the second floor. Whereupon they looked around for anyone who might be in sight. These efforts failing, they forced their way through the back door, all the while assuring that no one left the house.

The noise from the second floor, the Agents later discovered, was from a radio. No one was found in the apartment, and no search was made for evidence. While looking for people in the apartment, however, one of the Agents saw a telephone address book lying in clear view on a television stand. He opened it and took it away with him, in the belief it might

have some evidential value.

At trial, the court denied defendants' motion for suppression of this book as evidence. This is made a foremost point on appeal. We think that the trial judge was sound in his ruling.

Contrary to appellants' arguments, we hold that although not carrying a search warrant, the Agents were entitled to force their way into the apartment. As heretofore noted, the premises provided a regular rendezvous for the defendants to use in furtherance of their unlawful activities. The Agents sensed and were persuaded that someone was within but deliberately declining to answer the calls and knocking of the officers, because he or she was a member of the suspected "family" of offenders. Emanation of a noise from the second floor strengthened their conviction of the presence of someone in the apartment.

The Agents were knowledgable in the ways and wiles of narcotics violators.

With this predicate of facts, the Agents were entitled to obtain entry, especially when armed with arrest warrants, despite the absence of a search warrant.

While not identical with the situation at hand, clear precedent for this proposition is found in Rodriguez v. Jones, 473 F. 2d 599, 606 (5th Cir.), cert.denied, 412 U.S. 953 (1973). On the point the Court said:

> Force may be used to enter a dwelling...and although the person sought is not in the dwelling the actor is privileged to use force if he reasonably believes him to be there and enters in the exercise of a privilege to make a criminal arrest under a valid warrant. (Accent added).

As reinforcing this thesis, the Fifth Circuit cites, inter alia, Restatement (Second) of Torts. This commentary pro-

vides the following:

> §204. Entry to Arrest for Criminal Offense.
>
> The privilege to make an arrest for a criminal offense carries with it the privilege to enter land in the possession of another for the purpose of making such an arrest, if the person sought to be arrested is on the land or if the actor reasonably believes him to be there. (Citation Omitted).
>
> §206. Forcible Entry of Dwelling to Arrest, Recapture, Prevent Crime, and Related Situations.
>
> (2) Although the person sought is not in the dwelling, the actor is privileged to use force as stated in subsection (1) if he reasonably believes him to be there, and enters in the exercise of a privilege
>
> (a) to make a criminal arrest under a warrant valid or fair on its face.... (Citations omitted and accents added.)

In the Appendix, Reporter's Notes § 206, comment g at 225, are these additions:

> American decisions, however, recognize that there is such a privilege in an officer armed

> with a warrant who seeks to make a criminal arrest, and who reasonably believes that the person sought is in the dwelling ....
>
> A privilege to enter the dwelling of the person sought to be arrested upon reasonable belief that he is there is generally upheld.... (Citations omitted and accents added).

Surely the instant conduct of the Agents was within these permissible bounds.

In our judgment the Agents were lawfully within the apartment, thus endowing them with the limited right of seizure exercised in the taking of the book. As stated in Harris v. United States, 390 U.S. 234, 236 (1968):

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. (Citations omitted).

The District Court's denial of suppression of the book at trial was clearly

correct. It is posited in Coolidge v. New Hampshire, 403 U.S. at 465, 467 in this way:

> Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate.
>
> The "plain view" doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence.

In any event, the evidence of the appellants' guilt of the conspiracy is overwhelming. Mindful of the admonition noted in Harrington v. California, 395 U.S. 250, 254 (1969) not to attach too much weight to "overwhelming evidence" of guilt, we hold that appellants' "substantial rights" were not abridged. Any error which may have occurred in admitting the

seized book was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 23-24 (1967); Fed.R.Evid.103(a).

The third search and seizure, likewise made March 18, 1977, was executed at 2483 Lake in the Woods Boulevard, Apartment 788, Ypsilanti, Michigan. Experiencing no difficulty in admittance, they apprehended appellants Roberta Shaw and Richard J. Phillips under arrest warrants. At this time the Agents picked up two black books, lying open to view, and carried them away. For reasons already expounded for refusal of the Court to suppress the book seized in the first incident, on March 18, 1977, at 8219 Redlands Street, we approve the District Judge's refusal to suppress these two books.

III.

Appellants assert error in the reception of the testimony of Winifred R. Coley, described as an "insider" conspirator. She gave witness to the meaning of the cant of the conspirators, as recorded through the telephone interceptions. We see her qualified to do so because of her association with those trading in narcotics, and, particularly, with those involved in the instant drug transactions. Letting in this proof did not violate judicial discretion. Fed. R.Evid. 701 and 702.

IV.

Appellants lay error to the reception into evidence of a quantity of heroin taken from one Delano Harris on April 18, 1976, at the Detroit Metropolitan Airport in Michigan. He died before trial, and the only question now is whether the other appellants had standing to object to the

reception of this evidence. We think they did not.

Harris was among the conspirators; the proof abundantly revealed his complicity in the intrigue. Without doubt, he was carrying the heroin for his complotters. Although there may have been some question of probable cause for his arrest and the search of his baggage, wherein the heroin was discovered, he is not the one complaining about it. Harris' conspirers lack standing to challenge the search as Fourth Amendment rights are personal and "may not be vicariously asserted." Simmons v. United States, 390 U.S. 377, 389 (1968). Only the victim of the search is aggrieved by its illegality. United States v. Crowell, No. 76-2323 (4th Cir. 1978); United States v. Hunt, 505 F. 2d 931, 938-39 (5th Cir. 1974), cert.denied, 421 U.S. 975 (1975). To have established standing appellants would have to have shown

their presence or interest in the premises or that they were charged with an offense that includes possession as an essential element. Brown v. United States, 411 U.S. 223, 229 (1973). Here, the search occurred in an airport while Harris was travelling alone and the appellants were not convicted of possessing the drugs he carried. See United States v. Hutchinson, 488 F. 2d 484, 492 (8th Cir. 1973), cert.denied, 417 U.S. 915 (1974).

V.

Appellant Marzellus Wilson protests that he should have been granted a judgment of acquittal, on motion, of the conspiracy charge and illegal travel -- the latter under count twelve -- between Virginia and Maryland, on June 16, 1976, to distribute heroin and cocaine. No fault is perceived in the refusal to allow the motion for this relief in either instance. Even though no

physical evidence of narcotics was adduced under these accusations, there was ample incriminating parol testimony of his confederation with the other proven conspirators. This proof apparently was given credence by the jury, as they might do. Looking at this evidence in its most favorable light to the prosecution, as we must, it plainly convicts Wilson of both conspiracy and illegal travel.

VI.

Denial of appellant Bodiford's Sixth Amendment privilege to be confronted with the witnesses against him, he pleads, resulted from undue curtailment of his cross-examination of the witness Ms. Coley. She, it will be remembered, interpreted the vernacular in the intercepted conversations of those criminally handling narcotics. His contention is fiberless. The record discloses that wide scope was extended

Bodiford's counsel in cross-examination, restrained only when it became repetitive or irrelevant. At all events, the rulings were harmless, for Coley had not testified to Bodiford's detriment. We find no fault here in the Court's ruling.

VII.

Charles C. Jones, as well as concurring in that his of co-appellants, presents a supplemental brief of his own, seeking reversal of his conviction of conspiracy. Therein error is charged to the District Court's rulings on the points following:

(1) The search of the premises at 7035 Fleury Way in Pittsburgh, and his arrest there, on June 1, 1976, as a conspirator were illegal. We do not agree. The warrant for the search, the seizure of physical evidence, and the ensuing arrest were in no degree defective. There were several affidavits sustaining the warrant

and none deficient in any requisite.

(2) Nor was there defect in the ruling of the trial judge refusing to suppress the detective's identification of Jones' voice in a recorded wire tap. Prefatory evidence established acquaintance enough with Jones and his voice by the detective, rendering his opinion worthy of consideration. Also, his familiarity with the voice excluded any suspicion of coaching or suggestiveness. In any case, the identification procedure was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. at 384.

(3) Likewise free of error was the denial of Jones' motion for a judgment of acquittal. This ruling was called for by the police officers' observance of Jones' association with persons known to be

narcotic handlers, telephone toll records linking him to the other conspirators, and authentic ledger sheets showing Jones' receipt of heroin. Viewed in the light most favorable to the Government, the evidence was sufficient to permit the jury to find Jones guilty of the conspiracy charge beyond a reasonable doubt. See United States v. McCoy, 518 F. 2d 1293, 1294 (4th Cir. 1975).

The judgments on appeal will not be disturbed.

Affirmed.

APPENDIX "B"

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2353

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RICHARD JACK PHILLIPS,

Defendant-Appellant.

[Filed Nov. 16, 1983]

O R D E R

Upon consideration of the appellant's motion to file an oversized brief, together with his petition for rehearing and his suggestion for rehearing en banc, no request from a member of this Court having been made for a poll on this suggestion, it is

ADJUDGED AND ORDERED that:

1. The motion to file an oversized

brief is granted;

2. The petition for rehearing by the panel of this Court that heard the appeal is denied.

Done at Richmond, Virginia, this 16th day of November, 1983, at the direction of Bryan, J., with the concurrence of Widener and Hall, JJ.

For the Court

/s/ William K. Slate, II

Clerk

No. 83-1164

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD JACK PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission into evidence of five address books found by DEA agents in the course of executing arrest warrants for petitioner and his co-defendants violated petitioner's Fourth Amendment rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1164

RICHARD JACK PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 593 F.2d 553.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1978. The court of appeals entered an order vacating, withdrawing, and reissuing the mandate on October 14, 1983. See note 1, *infra*. A petition for rehearing was denied on November 16, 1983 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on January 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on a total of 16 counts of conspiracy to distribute heroin and

cocaine, in violation of 21 U.S.C. 846; use of a telephone to facilitate distribution of narcotics, in violation of 21 U.S.C. 843(b); interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; and operation of a continuing criminal enterprise, in violation of 21 U.S.C. 848. He was sentenced to a total of 22 years' imprisonment and a $50,000 fine. The court of appeals affirmed (Pet. App. 1a-23a).[1]

1. The evidence at trial established that petitioner operated a massive scheme, involving at least 47 named co-conspirators, to distribute narcotics in California, Michigan, Ohio, Pennsylvania, West Virginia, Maryland, and Washington, D.C. From his base in Los Angeles, petitioner directed the wholesale distribution of the narcotics to subordinates throughout the country, who in turn sold the drugs to retailers and to purchasers on the street. Tr. 233-236.

2. Prior to trial, the district court denied the motion of petitioner and his co-defendants to suppress evidence of five address books seized by government agents in the course of executing arrest warrants for petitioner and several of his co-conspirators. Evidence at a suppression hearing established that DEA agents executed arrest warrants for two of petitioner's co-conspirators, Terry Speech and Crystal

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[1]The judgment of the court of appeals was entered on December 6, 1978. In March 1981 petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. (Supp. V) 2255, alleging, inter alia, that he had been denied his Sixth Amendment right to effective assistance of counsel because his appellate counsel had failed to inform him of his right to petition for a rehearing in the court of appeals and of his right to petition this Court for a writ of certiorari. In August 1983, following a series of proceedings in the district court and the court of appeals, petitioner filed a motion to recall the mandate of affirmance in the court of appeals. In October 1983, the court of appeals granted petitioner's motion to recall the mandate (*United States* v. *Phillips*, No. 77-2353 (4th Cir. Oct. 14, 1983)). Petitioner then filed a petition for rehearing, which the court of appeals denied (Pet. App. 1b-2b).

Overton, at an apartment located on Redlands Street in Los Angeles. After they were admitted to the apartment, the agents arrested Speech and Overton and searched the apartment for petitioner, whom they believed was living there and for whom they also had an arrest warrant. While searching the second floor, an agent saw and seized an address book lying on a night stand in the master bedroom. Pet. App. 7a-8a; Tr. 7-9, 132-135.

Having failed to find petitioner at the Redlands Street address, the DEA agents went to an apartment on 20th Street that they had identified as a gathering place used by petitioner and his co-conspirators. The agents knocked on the door and announced their presence and purpose, but heard no response. Agents stationed at the rear of the apartment heard noises emanating from the second floor of the apartment. The agents then forced their way into the apartment, secured the premises, and searched for anyone who might be present. Pet. App. 9a-10a. In the course of the search, an agent seized what "was obviously an address book" (Tr. 21) lying on a television stand in a room on the second floor. The book appeared similar to those seized by other DEA agents earlier in the course of the investigation. The agents found no one in the apartment. It appeared that the noise they had heard came from a radio. Pet. App. 9a-11a; Tr. 9-10, 136.

On the same day, DEA agents in Ypsilanti, Michigan went to an apartment to execute a warrant for the arrest of petitioner and Roberta Shaw, a co-defendant. An agent knocked on the door, announced his purpose, and was admitted to the apartment by Shaw. Another agent searched the apartment for other conspirators known to frequent the residence and located petitioner in one of the bedrooms. The agents arrested petitioner and Shaw, advised them of their constitutional rights, and told them they would be taken to the federal building in Detroit. Since Shaw was not

dressed, an agent followed her into the master bedroom and told her to pick out the clothes she would wear. She selected clothes and dressed in the bathroom after the agents checked for weapons. An agent then accompanied Shaw to the living room, and another agent escorted petitioner to the bedroom to dress. Petitioner asked the agent to choose clothes because petitioner's wrist and thumb were broken. The agent selected a sweater, slacks, shoes, socks and a jacket. Another agent removed the jacket from the hanger and searched it for weapons. The agent discovered a telephone address book in the jacket and seized it. After petitioner returned to the living room, an agent asked Shaw to "get her purse, or anything she might want to take downtown." Shaw walked into the bedroom, accompanied by an agent, and picked up a large pocketbook. The agent seized two black telephone books when he saw Shaw transferring them from the pocketbook to a smaller purse. Pet. App. 16a; Tr. 149-155, 163, 180.

3. On appeal, petitioner contended that the district court erred in denying his motion to suppress the address books. The court of appeals held (Pet. App. 9a, 14a-15a) that the introduction into evidence at trial of the address books seized at the Michigan apartment and at the Redlands Street address in Los Angeles did not violate petitioner's Fourth Amendment rights because the seizures of the books were justified under the "plain view" doctrine articulated in the opinion for the plurality in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-467 (1971). The court of appeals rejected petitioner's claim that the seizure of the address book from the second Los Angeles apartment resulted from an unlawful forced entry (Pet. App. 14a-15a). The court also held that, in any event, the evidence of the guilt of petitioner and his co-defendants was so overwhelming that any possible error in admitting the book seized from the

second apartment was harmless beyond a reasonable doubt (*id.* at 15a-16a).[2]

ARGUMENT

Petitioner contends that the address books seized at the two Los Angeles apartments and the Michigan address were improperly admitted into evidence at trial, because the seizures did not meet either the search incident to arrest exception or the plain view exception to the warrant requirement. Both courts below correctly resolved these fact-bound claims against petitioner. No further review is warranted.[3]

1. Petitioner first contends (Pet. 9-16) that the searches of his jacket and articles Shaw removed from her pocketbook following their arrests at the Michigan apartment did not fall within the search incident to arrest exception. We

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[2]In addition, the court of appeals rejected various other claims raised by petitioner and his co-defendants (Pet. App. 17a-23a).

[3]Petitioner's long delay in seeking certiorari constitutes an additional reason for concluding that review is unwarranted. The petition was filed over five years after the court of appeals' decision affirming petitioner's conviction. Petitioner's claim is therefore in essence a collateral attack on his conviction, one that goes not to his guilt or innocence but to whether the exclusionary rule should have been applied to keep out admittedly relevant evidence. In view of the long delay, "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force." *Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976) (footnote omitted).

The court of appeals appears to have granted petitioner's motion to recall and reissue the mandate based on his contention that his counsel's failure to advise him of his right to petition for rehearing in the court of appeals and of his right to petition this Court for a writ of certiorari deprived him of his Sixth Amendment right to effective assistance of counsel. See note 1, *supra*. Although the United States Attorney did not oppose petitioner's motion, we note that this Court's decision in *Wainwright* v. *Torna*, 455 U.S. 586 (1982)(per curiam), would appear to require rejection of petitioner's Sixth Amendment claim.

note at the outset that petitioner has no "standing" to challenge the seizure of the items Shaw removed from her pocketbook, since he has not demonstrated that he had any expectation of privacy in the contents of her pocketbook. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *United States* v. *Salvucci*, 448 U.S. 83 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

In any event, the courts below properly concluded that the searches at the Michigan apartment were incident to the arrests of petitioner and Shaw. Petitioner does not suggest that agents knew the location of the address books and thus used the selection of his jacket as a pretext for discovery of the address book it contained. And by petitioner's own account (Pet. 7), the agents simply suggested that Shaw might wish to take a smaller purse with her. There is no indication that the agents knew what Shaw's pocketbook contained. There can be no dispute that the agents could have lawfully seized the address books from petitioner and Shaw when they were processed at the federal building. See *Illinois* v. *Lafayette*, No. 81-1859 (June 20, 1983), slip op. 6. Petitioner can hardly complain that the address books were seized somewhat earlier in the course of searches that were of minimal intrusiveness (see slip op. 5). In any event, it is settled that officers may search clothing worn by an arrested person (*United States* v. *Edwards*, 415 U.S. 800 (1974)), including coat pockets (*United States* v. *Campbell*, 575 F.2d 505, 507-508 (5th Cir. 1978); *United States* v. *Smith*, 565 F.2d 292, 294 (4th Cir. 1977)) and purses (*United States* v. *Brown*, 671 F.2d 585, 586-587 (D.C. Cir. 1982); *United States* v. *Moreno*, 569 F.2d 1049, 1052 (9th Cir.), cert. denied, 435 U.S. 972 (1978)). Thus, the searches at issue here were entirely proper.

Contrary to petitioner's claim (Pet. 14-15), the address books had immediate and obvious evidentiary value to the agents, who were well aware that petitioner and Shaw were

participants in a large interstate drug conspiracy that used telephones for communication. In view of their knowledge and experience (see *United States* v. *Cortez*, 449 U.S. 411, 418 (1981)), the agents were certainly justified in recognizing that the address books had evidentiary significance.

2. Petitioner also contends that the seizures of the address books in Los Angeles were not justified by the "plain view" exception to the warrant requirement. Petitioner first claims (Pet. 17-21) that the seizure of the address book found at the 20th Street apartment was unjustified because the agents used unlawful force to enter the apartment. Petitioner concedes (*id.* at 18) that the officers would have been justified in forcing their way into the apartment if, after having given notice of their authority and purpose, they received no response and reasonably believed the apartment was occupied. He maintains, however, that the courts below erred in concluding that the officers reasonably believed someone was inside the apartment. But at the time they arrived at the 20th Street apartment, the agents knew that petitioner and his co-conspirators used the apartment as a gathering place, and they also knew that petitioner was not at his usual residence (the Redlands Street address) that morning. Thus, when the agents heard a noise coming from the apartment, they could reasonably have concluded that petitioner or a co-conspirator might have been attempting to conceal their presence. Under those circumstances the agents were justified in using force to enter the apartment. See *United States* v. *Tolliver*, 665 F.2d 1005, 1007-1008 (11th Cir.), cert. denied, 456 U.S. 935 (1982); *United States* v. *Jackson*, 585 F.2d 653, 662 (4th Cir. 1978); *United States* v. *Allende*, 486 F.2d 1351, 1352-1353 (9th Cir. 1973), cert. denied, 416 U.S. 958 (1974).[4]

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[4]Moreover, as the court of appeals held (Pet. App. 15a-16a), even if the address book seized at the 20th Street apartment were wrongly introduced into evidence, any error arising from its admission was clearly harmless in view of the overwhelming evidence against petitioner. See note 5, *infra*.

Petitioner also claims (Pet. 21-23) that the agents' discovery of the address book at the Redlands apartment was not "inadvertent," as required under the plain view doctrine. But the agents clearly had a right to be in the apartment in order to execute an arrest warrant and to see whether anyone else might have been in the residence. As this Court recently noted in discussing the plain view doctrine, "our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion (citations omitted)). There is no suggestion here that the officers used the arrest warrant as a pretext to search for evidence of petitioner's drug trafficking. Thus, the "inadvertence" prong of the plain view doctrine was satisfied. See slip op. 6.

Contrary to petitioner's contention (Pet. 23-30), this case meets the requirement that the evidentiary value of the seized item be "immediately apparent" to police (*Texas* v. *Brown*, slip op. 6). Following the court of appeals' decision, this Court denied certiorari in a case in which one of petitioner's co-defendants raised a similar claim. *Speech* v. *United States*, 441 U.S. 947 (1979). As we pointed out in our brief in opposition in *Speech*, because the agents were dealing with a large conspiracy that routinely used telephones in transacting its business, an address book belonging to a co-conspirator was almost certain to contain incriminating evidence. This common sense understanding of the officers' knowledge is consistent with the probable cause standard and meets the requirements of the plain view doctrine. See *Texas* v. *Brown*, slip op. 10-11.[5]

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[5]In any event, any error in admitting the address books was harmless beyond a reasonable doubt. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 9. As the court of appeals recognized (Pet. App.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

15a), the evidence against petitioner was overwhelming. Several participants in the conspiracy testified at trial that petitioner had recruited others to join the narcotics organization, instructed them in the mechanics of drug distribution and, along with one other conspirator, controlled the operation (Tr. 198-381, 735-810, 835, 871, 971-982, 1064-1068, 1083-1088, 1351-1366, 1381-1384, 1394-1395, 1396-1397, 1399, 1413-1414, 1437-1441, 1442-1443, 1972-1975, 2028-2031). One witness testified that petitioner had told her he had made three million dollars in the drug business (Tr. 1447). Intercepted telephone conversations between petitioner and others about the drug operation were also introduced at trial (Tr. 1940, 1950, 1957, 1970). Petitioner himself testified at trial and admitted he had been involved in the drug operation (Tr. 2801-2819). Thus, introduction of the evidence of the address books listing telephone numbers of certain co-conspirators was cumulative and did not add in any significant way to the overwhelming evidence of petitioner's guilt.